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Supreme Court of the United States

OCTOBER TERM, 1959

No. 676

In the Matter

—of—

116TH STREET PAWNBROKERS, INC.,

Bankrupt.

RICHARD SHONGUT, JACOB SHONGUT, INC., and MITCHELL MOGAL,

Petitioners-Appellants,

JULES GOLDEN,

Trustee-Respondent.

TRUSTEE-RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI BY THE PETITIONERS-APPELLANTS

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The facts as briefly and fully stated in the opinion by the United States Circuit Court of Appeals are as follows:

On December 14, 1955, 116th Street Pawnbrokers, Inc. filed a petition for an arrangement under Chapter XI, Section 322, of the Bankruptcy Act, 11 U. S. C. A. Sec. 722. On May 8, 1956, the referee held a hearing on the third amended plan, which was approved by a majority of creditors. Three creditors, the appellants here, opposed the plan; they were given two weeks to file specifications of objections to confirmation of the plan and the date for hearing of their objections was set for May 31, 1956. At the hearing, the debtor sought to withdraw the plan, but leave so to do was

refused by the referee. The debtor then pointed out that the deposit required under Section 337(2) of the Act, 11 U. S. C. A. Sec. 737(2), had not been made, and that an application to confirm the arrangement had not been filed within the time fixed by the court pursuant to Section 337(3), 11 U. S. C. A. Sec. 737(3). Although the appellants were ready with their evidence in opposition to a confirmation, the referee refused to hear them and, without taking any evidence, for lack of the required deposit and application for confirmation declared the debtor bankrupt pursuant to Section 376 of the Act, 11 U. S. C. A. Sec. 776. Thereafter these appellants, under Section 64(a)(3) of the Act, 11 U. S. C. A. Sec. 104, made applications for allowances from the estate to cover fees and expenses of counsel who had been retained by them to oppose the confirmation of the plan and who had spent much time in the preparation of their opposition. On April 3, 1958, the referee dismissed these applications. The District Court affirmed the orders and appeals followed.

The sole issue involved is whether there was a "refusal" upon the merits of a plan of arrangement within the purview and meaning of Section 64(a)(3) of the Bankruptcy Act, 11 U. S. C. A. Sec. 104(a)(3), and whether that "refusal" was due to the objections, efforts and at the cost and expense of the opposing creditors.

The relevant portion of the statute involved is as follows:

> "Bankruptcy Act, Section 64(a)(3), 11 U. S. C. A. Sec. 104(a)(3), allows, as a debt having third priority:
>
> > 'Where the confirmation of an arrangement * * * has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors * * * the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside * * *.'"

In the subject case there was an adjudication by the referee as a result of the nonfulfillment of stated procedural conditions to confirmation including among other grounds, a lack of deposit. There was no refusal of confirmation based upon a lack of merit in the plan or based upon the objection and through the efforts of the appellants-creditors.

The petitioner contends that the issue involved is of sufficient general application beyond the interest of the parties to this proceeding and that it presents a question of great importance allegedly affecting the very substance of bankruptcy proceedings and objecting creditors.

Actually what is involved in this case is that the appellants-creditors proceeded with their investigation and services in connection with objections which were filed before the fulfillment of certain stated procedural conditions to confirmation.

If the appellants had waited as indicated by the Circuit Court of Appeals, until the deposit had been actually made before preparing the objections to confirmation, then all of the efforts and objections of the appellants would have been avoided.

The appellants argue in effect as a matter of equity and fairness that they are entitled to consideration since they were diligent in conducting an investigation and preparing objections and that therefore they should be compensated for the same, even though no hearing was ever had. Whether the objections or services of the creditors involved herein had any merit whatsoever, remains completely undetermined, since no hearing was ever held.

The provisions of the statute involved, namely Section 64(a), subdivision (3), of the Bankruptcy Act, are clear and the interpretation to be applied to the act as well as the application of equitable principles to the issues has been fully and completely determined by prior judicial decisions.

In the case of *In re Friedman*, 2 Cir., 232 F. 2d 151, cert. den. sub nom. *Klein* v. *Brandt and Brandt Printers, Inc.*, 352 U. S. 835, it was stated on page 152:

> "it is well settled that the bankruptcy court lacks power to grant, and the policy of the act is against, compensation not expressly provided for by the act. Lane v. Haytion Corp., 2 Cir., 117 F. 2d 216, 219, cert. den. 313 U. S. 580, 61 S. Ct. 1101, 85 L. Ed. 1537.
>
> "Although it has been broadly stated that a bankruptcy court is a court of equity, Young v. Higbee Co., 324 U. S. 204, 214, 65 S. Ct. 594, 89 L. Ed. 890, the exercise of t' s equitable power must be strictly confined withir the prescribed limits of the Bankruptcy Act. See Berry v. Root, 5 Cir., 148 F. 2d 945, 946, cert. den. 326 U. S. 755, 66 S. Ct. 91, 90 L. Ed. 453.
>
> "Where Congress intended that allowances should be made, it has carefully enumerated them and any omission must be construed as express exclusions. 3 Collier, Bankruptcy 534-7 (14 Ed.)."

The Circuit Court of Appeals in the case at bar, therefore, correctly stated in reviewing the general principles governing allowances of creditors "the paramount postulate of economy pervading the law on bankruptcy liquidation requires that an omission by the legislator to provide for costs and expenses to creditors in a particular situation be construed as a purposed exclusion, not as a gap to be bridged by judicial legislation."

It is therefore certain that the creditors can receive compensation where there has been a refusal upon the merits and due to the objections and through the efforts of the creditors. Although in subdivision 1, page 10 of the petition, the appellants argue that the refusal to confirm was based on the merits of the case and not on the nonfulfillment of the procedural conditions, the appellants fail to set forth in what

respect the alleged refusal was based upon the merits of the case.

The sole conclusory and improper argument is made that "refusal" may be in various forms and may be inferred from the circumstances surrounding the proceedings.

The argument is then made by the appellants that the debtor in some way knew that the objections of the creditors would be sustained and therefore failed to put forth a deposit. This is pure conjecture and surmise and the appellants might as well contend that the referee by some miracle could know or infer that there was merit to the objections by the creditors upon which no hearing had been held.

It is submitted that a strict interpretation of the statute is necessary since to do otherwise would be to open up the door to claims for fees based merely upon the fact that objections were filed. In addition a loose interpretation would permit post-mortem speculations as to the possible effect a filed objection had upon a turn of events even though no proof was ever presented in connection with the objections.

The appellants' entire position is based upon pure speculation that they could have proved fraud if permitted by the referee and whatever proof they could have offered would have resulted in a refusal on the merits by the referee thus giving rise to a basis for their application for expenses and fees. As a result there was no refusal on the merits of the case and to infer that the referee by adjudicating the debtor as a bankrupt, as a result of non-compliance with procedural requirements, was making a determination upon the merits, would constitute crystal ball gazing but not an inference based upon any facts.

Under subdivision 2, the appellants argue in essence that the referee erred in not conducting a hearing on the objections and that in effect the referee's adjudication of bankruptcy was in error.

It must be pointed out that there was no appeal from the order of adjudication which in effect precluded the

appellants from having a hearing on the objections and therefore the contention of the appellants under then subdivision 2 of the petition does not properly lie. Since no appeal from the order which precluded a hearing was filed, the claim that a hearing should have been held by the referee cannot be maintained.

The appellants contend, however, that the case of *Meyers* v. *Intl. Trust Co.*, 263 U. S. 64, 72, held that a reference for a hearing of objections is equivalent to a hearing in equity and constitutes a new suit.

The respondent believes that the authority of *Meyers* v. *Intl. Trust Co.*, 263 U. S. 64, 72, does not apply in any manner whatsoever to the case at bar. In addition, any interpretation that the filing of objections is equivalent to the start of a new suit and a hearing in equity does not foreclose a determination or dismissal of that suit on justifiable grounds for which the objecting creditor was in no way responsible.

The appellants' authorities to the effect that a debtor cannot withdraw a plan as a matter of right, have no application to the facts involved in the case at bar since no withdrawal by the debtor was permitted by the referee.

Under subdivision 3 of the petition the appellants contend that the question involved is of great importance in the administration of the Bankruptcy Act since thousands of petitions are presented each year for plans of arrangement and that creditors would very rarely file objections if they had to wait until an application for confirmation was filed and a deposit made.

It is a matter of common knowledge that objections are not rare and that the provisions of Section 64(a)(3) fully provide for the rights of all those creditors, as admitted by the appellants.

The appellants quote Collier on Bankruptcy as advocating the suggestion that successful opposition to the mere offer of a plan should be compensated.

The appellants then incorrectly quote the court below and try to attribute to the court below the opinion that the problem as presented by the appellants is "a gap to be bridged by judicial legislation."

An examination of the opinion in the court below indicates that the complete and correct quotation as set forth on page 17 of the petition is as follows:

> "The paramount postulate of economy pervading the law on bankruptcy liquidation requires that an omission by the legislator to provide for costs and expenses to creditors in a particular situation be construed as a purposed exclusion, not as a gap to be bridged by judicial legislation."

It is therefore clear that the Circuit Court of Appeals did not describe this issue or problem "as a gap to be bridged by judicial legislation" but rather that the omission of the statute to provide for any particular situation was not a gap to be bridged by judicial legislation. There is no evidence that the rights of objecting creditors are not fully protected by the statute and that certainly objections to a plan of arrangement are not a rarity as contended by the appellants.

It is respectfully submitted that the statute involved is clear and presents no confusion. It provides with good reason, that only an objecting creditor who succeeds on the merits in proving his objection and thus bringing about a refusal of a plan of arrangement, can be compensated for his efforts. The principles of law involved have been thoroughly adjudicated and firmly established.

This case merely involves creditors who took it upon themselves to perform certain services at a time when those services could have been held in abeyance, if the rules had been followed by the appellants-creditors.

The case does not involve an issue which would be applicable to all other objecting creditors and therefore this case is not a proper one for review by certiorari in this court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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